FILED
JUL 5 197
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1767

JAMES BURCHETT,

Petitioner,

v.

HAROLD J. CARDWELL, Warden,
Arizona State Penitentiary,

Respondent.

REPLY MEMORANDUM SUPPORTING PETITION FOR WRIT OF CERTIORARI

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I. The Record Does Not Support The Lower Courts' Conclusions That Burchett's Guilty Pleas Were Voluntarily Given.

The principal issues involved in Burchett's Petition are whether his right to counsel was satisfied under the "effective assistance of counsel" standard and whether the record supported the lower courts' finding that Burchett's guilty pleas were voluntarily entered. Where

such constitutional issues are involved, this Court is not bound by the lower courts' factual conclusions but will re-examine the evidentiary basis on which those conclusions are founded. E.g., Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Hudson v. North Carolina, 363 U.S. 697, 80 S.Ct. 1314, 4 L.Ed.2d 1478, (1960); Brooks v. Florida, 389 U.S. 413, 88 S.Ct. 541, 19 L.Ed.2d 643 (1967); Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).

In applying this standard, the record references in the Warden's Response do not sustain the lower courts' rulings. Dr. Maier Tuchler was the only psychiatrist who testified at the habeas corpus evidentiary hearing. He had treated Burchett regularly during 1958-1959 and had also seen him at the State Prison follow-

ing his convictions in late 1962, again in February 1963, and at various times thereafter (T.14). His qualifications to give opinions as a psychiatric expert witness were agreed to without question (T.9).

Pages 2-3 of the Response have mischaracterized the substance of Dr. Tuchler's testimony. Dr. Tuchler was firmly of the opinion that at the time of Burchett's guilty pleas, "he was essentially so full of shame, so hopelessly enmeshed in what he had done, and how it had happened, that he was really without volitional control in this matter " (T.48). Although Burchett could intellectually judge right from wrong, he lacked the "ability to control himself" (T.35-36). His passive dependency was determined by the opinions of others (T.39). Dr. Tuchler also believed Burchett was under

a tremendous amount of pressure from his parents, attorney, and otherwise at the time of the decision for him to plead guilty (T.44).

The Response has also mischaracterized the substance of Burchett's father's testimony. This testimony, also uncontradicted, was that he told Burchett that a guilty plea "was the only avenue he had to go" and that Burchett's counsel was not present at that time (T.93). He also stated that Burchett accepted the decision the father had made without question in any way, saying, "Dad, I don't know what else we can do" (T.94). He did not recall that the sentencing judge made any inquiry as to whether the guilty plea had been given voluntarily or as to the circumstances of or reasons for the entry of that plea (T.96). There was no affirmative testimony or

other evidence in the record that any such inquiry was made either at the time of Burchett's entry of the pleas or at his sentencing.

The Response has further misconstrued the testimony of the state court judges involved. The judge who accepted the guilty pleas did not recall anything specific as to Burchett's particular case at all as to whether he made any inquiry concerning whether the guilty pleas were voluntarily entered (T.241-43). His testimony concerning his general practice in inquiring as to voluntariness was, therefore, insufficient to establish that any inquiry was made in Burchett's case. The state court record itself was completely silent as to whether any such inquiry was made. The sentencing judge could only recall asking Burchett whether he had anything to say or any legal cause

why he should not pass sentence (T.250). He also could not remember whether he made any inquiry of Burchett as to whether any prior guilty pleas were voluntarily given (T.251-53). The sentencing judge had no recollection at all as to anything outside what the printed record showed as to Burchett's sentencing (T.252-53). That record was also completely silent as to whether any voluntariness inquiry was made.

The police officer who first obtained Burchett's confession admitted that no warnings were given prior to his interrogation (T.211-12). He believed that Burchett's statements were voluntary only because "I knew in my own mind that I didn't promise him, and I didn't threaten him, and I didn't coerce him" (T.212). He was unaware that Burchett had been previously hospitalized for psychiatric

treatment (T.210-11). He apparently made no inquiry as to Burchett's state of mind or whether he was truly capable of giving a voluntary confession even though his "head was hanging down" and he appeared "remorseful" (T.212).

The Deputy County Attorney who thereafter interrogated Burchett further also did not testify to any inquiry concerning Burchett's psychological ability to give a voluntary confession, although he also vividly recalled that he appeared "very remorseful in his conduct, and his actions seemed extremely sorry, to the extent that it engendered in myself some feeling of sorrow on his behalf " (Tr.221). He also admitted that there was a discussion of future hospitalization for him at or shortly after he had again confessed (T.221-22).

All of this undisputed testimony,

together with that summarized in the Petition itself, amply confirms that there was no sufficient record to support the lower courts' conclusions that Burchett's confessions were voluntarily given or that his guilty pleas were thereafter voluntarily entered. They should, therefore, have been set aside.

II. Burchett Was Not Provided The Effective Assistance of Counsel.

Neither the district court's conclusion that "the evidence falls far short of showing a violation of federal standards in the assistance of counsel" (R.190, Appendix to Petition, at 8a) or the court of appeals' affirmance of those findings without elaboration (Appendix to Petition, at 12a) is supported by the actual events that occurred. Those conclusions are also inconsistent with the

applicable standards for the effective assistance of counsel required by this Court and several other circuit courts.

The Response does not dispute that Burchett's trial counsel totally failed to inquire of him concerning the background of his confessions and his mental condition or to have him examined by a psychiatrist to determine his criminal responsibility and his ability to control his behavior or to assist in his defense. Under the facts presented, these failures clearly violated counsel's constitutional responsibility to be zealous and active and to explore potentially exonerating defenses.

The Ninth Circuit itself has previously recognized that the failure of background investigation by counsel can cause his later advice to plead guilty to fail to meet constitutional requirements.

United States v. Norman, 412 F.2d 629 (9th Cir.1969). This Court has also held in McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel."

The Response at pages 9-10 agrees that the Ninth Circuit has taken the position that counsel's errors do not violate a defendant's right to a fair trial unless they reduce the trial to a "farce" or a "mockery of justice." Although not elaborated in its opinion, application of this standard was the only possible basis for the court of appeals' decision in the present case. This standard, however, as it exists in the Ninth Circuit and in the other circuits referred to in the Response, simply cannot be reconciled with

the standard required by this Court and the Fifth, Sixth, and District of Columbia Circuits of "counsel reasonably likely to render and rendering reasonably effective assistance." The Fifth Circuit in West v. Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973) has expressly recognized the distinction between the two standards.

The Response's argument that these standards are really the same is not justified by the cases. Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), has rejected the "farce and mockery" standard as too subjective and not a meaningful test of the objective requirements there set forth. Violations of those objective standards include defense counsel depriving a criminal defendant of a potential defense by his own ineffectiveness or incompetence, not performing at least as well as a lawyer with

ordinary training in skill and criminal law, not investigating all apparently substantial defenses available to defendant and asserting them in a timely and proper manner as well as advising the client erroneously on a clear point of law if this advice leads to a deprivation of the client's right to a fair trial. Bruce v. United States, 379 F.2d 113 (D.C.Cir. 1967) and Scott v. United States 427 F.2d 609 (D.C. Cir. 1970), have both also held that the "farce and mockery" standard is no longer valid as such and that the appropriate standard for ineffective assistance of counsel is "whether gross incompetence blotted out the essence of a substantial defense " 427 F.2d at 610. This requirement was also met in the present case. The efforts by trial counsel referred to at pages 14-15 of the Response hardly meet the required standard.

Counsel simply did not explore any possible basis for suppressing Burchett's confession or attempt to develop any meaningful psychiatric defense. His advice to plead guilty therefore was not based on an adequate foundation and should not insulate the guilty plea from constitutional challenge.

III. The Circumstances Under which the Supreme Court of Arizona Affirmed Burchett's Convictions Denied his Rights to Due Process and Equal Protection of the Law.

Burchett's Petition contends that the overruling of two of the Arizona Supreme Court's prior decisions in an opinion signed by all five Justices following arguments in which only three Justices participated when that issue was not either briefed or argued denied his

rights to due process and equal protection of the law. Burchett's argument is not that the Arizona court as an original matter could not hear his case either in division or in banc. It is instead that the court's overruling of its prior decisions under the circumstances involved denied his constitutional rights in connection with the appeal.

The authorities cited by the Response do not, as it claims, "reject as without merit arguments similar to petitioner's." This Court's decision in United States v. American Foreign S.S. Corp., 363 U.S.680, 80 S.Ct. 1336, 4 L.Ed.2d 1491 (1960), instead vacated a judgment where a court of appeals panel was improperly constituted. Neither Center School Dist. No. 58 v. Kenton, 345 S.W2d 120 (Mo. 1961), nor Fette v. City of St. Louis, 366 S.W.2d 446 (Mo. 1963), deal with any comparable

issues whatsoever. None of the other decisions concern an appellate court panel's constitutional responsibilities of due process or equal protection before it may overrule prior cases decided by the full court. None of them reach the situation where, as here, justices signed an opinion who had not heard the argument and thereby overruled prior decisions without briefing or oral argument of that issue. This is the precise set of circumstances in which Burchett's rights were violated.

Conclusion.

For all the foregoing reasons, therefore, in addition to those stated in Burchett's Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LEWIS AND ROCA

By Paul G. Ulrich
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July, 1974